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United States
Circuit Court of Appeals

For the Ninth Circuit

TOM BROWN,

Plaintiff in Error,

vs.

HARRIET S. PULLEN,

Defendant in Error.

Brief for Plaintiffs in Error

**Upon Writ of Error to the District Court
for Alaska,
Division No. 1**

J. H. COBB,

Attorney for Plaintiff in Error.

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BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

Plaintiff and defendant in error were plaintiff and defendant respectively in the court below, and will be so designated hereinafter.

The action was upon a contract of hiring for a balance of wages claimed to be owing. Plaintiff alleged that he was employed by the defendant on December 3rd, 1915, at \$60.00 per month and worked for her at said rate till June 4th., 1916; that from June 5th., 1916, to June 11th. 1917, he was employed by and worked for defendant at an agreed wage of \$65.00 per month; that he had been paid \$288.00 and there was a balance due and owing of \$869.00 for which judgment was prayed.

The answer admitted the hiring, the services rendered, and the period of the employment, but denied that the stipulated wages were \$60.00 and \$65.00 per month as claimed by plaintiff, and alleged that the stipulated wage was \$1.00 per day for the entire period. It was further denied that any indebtedness was owing plaintiff, and alleged "that she paid plaintiff various sums of money

from time to time in accordance with his request, among which were the specified sums set forth in the said plaintiff's complaint, and alleges that on said 13th. day of June, 1917, she settled with plaintiff in full for all claims the said plaintiff made against her, and the said plaintiff accepted said settlement in full satisfaction of all claims against defendant."

This was denied by the reply.

It will thus be seen that the pleadings presented these issues:

1st. At what wages did plaintiff agree to work during the 554 days he was in defendant's employ? Was is \$60.00 per month for the first six months and \$65.00 per month for the next year and six days, or was it \$1.00 per day for the whole period?

2nd. How much had defendant paid the plaintiff, if anything, in addition to the \$288.00 admitted?

If the jury found in favor of plaintiff's contention as to the wages then he had earned, in all, \$1153.00 and there was due him a balance of \$865.00, unless the jury further found that defendant had paid him in addition to the \$288.00 the further sum of \$276.00, the most she claimed, in which case there would still be due plaintiff \$599.00 If the rate was \$1.00 per day, and defendant had only paid plaintiff \$288.00 then the

verdict should have been for plaintiff for \$276.00. The verdict could only have been legally rendered for the defendant by a finding that the rate was \$1.00 per day, and that the defendant had paid the plaintiff \$554.00.

The evidence for the plaintiff tended to show that he was employed Dec. 3rd., 1915, at \$60.00 per month and worked at that rate for six months; that his wages were then agreed to be \$65.00 per month, and he worked at this agreed rate for one year and six days; and that he had only been paid the sum of \$288.00.

The evidence for the defendant tended to show that the agreed rate of wages for the entire period was \$1.00 per day. Defendant testified that in addition to the \$288.00 admitted to have been paid she had paid other sums, but the dates and amounts of these payments were not stated nor the aggregate amounts thereof. She further testified that on June 13th. 1917, plaintiff only claimed a balance due of \$200.00, which was admittedly paid, and she produced a check for \$150.00 given plaintiff on that date marked in full settlement of wages to date. Plaintiff testified that the memorandum was not on the check at the time he received it, and that at that time defendant promised at a later date to pay him the balance of his wages.

It will thus be seen that the issues made by the evidence followed very closely the issues made

by the pleadings. Instead of submitting these issues to the jury, however, the Court withdrew them all in effect except the first, by instructing the jury that unless they found that the rate of wages agreed on was \$60.00 per month they could not find anything for plaintiff; and this instruction was excepted to and is assigned as error. 'The jury returned a verdict for defendant, upon which judgment was entered.

ASSIGNMENT OF ERROR

The Court erred in instructing the jury as follows: "It is either \$60.00 a month or it is nothing. It is the contract which he alleges, and the contract which she denies, that he relies on, and you cannot split the difference—you cannot do anything of that kind. It is \$60.00 a month, or it is not \$60.00 a month. If it is not \$60.00 a month the Plaintiff cannot recover."

ARGUMENT

This instruction it seems to us, was obvious error. If defendant had denied the contract entirely in her answer, and the jury had found that there was no contract such as was alleged in the complaint, it might be that under the rule in an action on contract plaintiff must prove the contract as alleged, in all its terms, or fail entirely,

the instruction of the Court could be sustained. But no such question is presented here. *Defendant did not deny the contract sued upon. She expressly admitted it.* The only issue she tendered on the contract, was as to the correctness of one of the terms, viz. the rate of compensation, and she alleges this term, as she claims, correctly, and then tenders the issue of full payment under the contract as corrected by her answer. This issue is met by plaintiff's denial. The issues thus raised are accepted by counsel for both parties, and evidence adduced for and against the issues as made. Having thus made and tried the issues between the parties as they actually existed, both counsel were equally astonished when the Court withdrew all of them except one, and made the plaintiff's right to recover anything for his year and a half work, depend, not upon what he had earned, and whether he had been paid that amount, *but whether he had correctly plead his rate of wages.* Yet if plaintiff had incorrectly stated this one term of a contract, otherwise fully admitted, the error had been corrected by the answer. Under the pleadings and evidence then, it was NOT \$60.00 a month or nothing. Nor did it follow that if the contract was not \$60.00 a month the plaintiff could not recover; for if the rate was \$1.00 per day, and he had only been paid \$288.00, he was, under the pleadings and evidence, still entitled to recover \$276.00. And on the issue of payment the defendant's testimony was too

vague and uncertain to have any probative force or effect whatever. The obviously correct instruction was that if the jury found that the rate of wages was \$60.00 and \$65.00 per month, as claimed by plaintiff, to find for the plaintiff for \$1153.00 less the amount admitted or proved to have been paid him. If the jury found that the rate was \$1.00 per day for the entire period, to find for the plaintiff for \$554.00 less the sum admitted to have been paid, and less such further sums as they found had been paid. If they found that there was no rate of wage agreed upon to find for the plaintiff for the reasonable value of his services, less the sums admitted and proved to have been paid. *Rocco vs. Parczyk*, 9 Yeo (Tenn.) 328.

For the said error we respectfully submit that the judgment should be reversed and the cause remanded for a new trial.

J. H. COBB,

Attorney for the Plaintiff in Error.